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IN THE

Supreme Court of the United States

October Term, 1959.

No. 363

TAHITI BAR, INC.,

Appellant,

v.

PENNSYLVANIA LIQUOR CONTROL BOARD

and

COMMONWEALTH OF PENNSYLVANIA.

Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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INDEX.

	Page
Statement as to Jurisdiction	1
Opinions Below	2
Jurisdiction	2
Questions Presented	5
Statement of the Case	6
The Questions Presented Are Substantial	10
A. The Constitutionality of the Pertinent Provisions of the Pennsylvania Liquor Code	10
B. The Conflict Between the State's Power to Regulate the Dispensing of Alcoholic Beverages and the Guarantee of Freedom of Expression and of Due Process Under the Fourteenth Amendment	11
C. The Entertainment in Question Was Protected by the Guarantee of Freedom of Expression	12
D. Appellant Was Entitled to Trial by Jury of the Issue of Obscenity	14
E. The Board's Regulation in Question Is Invalid	14
Conclusion	15
Appendix:	
Opinion of the Supreme Court of Pennsylvania	1a
Opinion of the Superior Court of Pennsylvania	16a
Opinion of the Court of Quarter Sessions of Philadelphia County	23a

TABLE OF CASES CITED.

	Page
Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495	2, 10, 14
Commonwealth v. Blumenstein, 390 Pa. 417	11
Gelling v. Texas, 343 U. S. 960	10
Hannegan v. Esquire, Inc., 327 U. S. 146	13
Holmby Productions, Inc. v. Vaughn, 350 U. S. 270	10
Kingsley Books, Inc. v. Brown, 354 U. S. 436	2, 14
Kingsley International Pictures Corp. v. Regents, etc. — U. S. —, 79 S. Ct. 1362	2, 13
Roth v. United States, 237 F. 2d 796 (C. A. 2, 1956)	14
Roth v. United States, 354 U. S. 476	2, 12, 13, 14, 15
Stromberg v. People of California, 283 U. S. 359	10, 11
Superior Films v. Department of Education, 346 U. S. 587	2, 10
Times Film Corp. v. Chicago, 355 U. S. 35	10
Winters v. People of State of New York, 333 U. S. 507	10

MISCELLANEOUS.

	Page
Model Penal Code, Sec. 207.10(2) (Tentative Draft No. 6, 1957)	12, 13
Pennsylvania Liquor Code and Regulation 110.02D	1, 4, 5, 7, 9, 14
Pennsylvania Liquor Code, Act of April 12, 1951, P. L. 90, 47 Purdon's Statutes Sec. 1-101 et seq.	3, 4, 5, 7
Pennsylvania Penal Code of 1939, Section 528	11
28 U. S. C. Section 1257(2)	2
U. S. Constitution, Fourteenth Amendment	10, 11
United States Supreme Court Rules 13(2) and 15	1

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COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION.

Appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, files this its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order of the Supreme Court of Pennsylvania, affirming the order of the Superior Court of Pennsylvania, in turn, affirming the order of the Court of Quarter Sessions for the County of Philadelphia, upholding a decision of the Pennsylvania Liquor Control Board which suspended appellant's restaurant liquor license and amusement permit upon the ground of alleged violation of the Pennsylvania Liquor Code and Regulation 110:02D issued pursuant thereto.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania, filed March 25, 1959, is reported at 395 Pa. 355, 150 A. 2d 112, and is printed in the appendix hereto. The opinion of the Superior Court of Pennsylvania, filed June 11, 1958, is found at 186 Pa. Superior Ct. 214, 142 A. 2d 491, and is printed in the appendix hereto. The opinion of the Court of Quarter Sessions for the County of Philadelphia, filed May 20, 1957 is not reported, but is printed in the appendix hereto.

JURISDICTION.

This appeal is from an order of the Supreme Court of Pennsylvania upholding the constitutionality of certain portions of the Pennsylvania Liquor Code and Regulation 110.02D issued pursuant thereto, and affirming the order of the Superior Court of Pennsylvania (and, in effect, of the Court of Quarter Sessions for Philadelphia County) which affirmed the order of the Pennsylvania Liquor Control Board suspending the appellant's restaurant liquor license and amusement permit. The Supreme Court of Pennsylvania issued its order on March 25, 1959. Notice of appeal to this Court was filed with the Supreme Court of Pennsylvania on May 1, 1959. An extension of time for docketing the appeal in this Court until August 29, 1959, was granted by the Supreme Court of Pennsylvania on June 1, 1959.

The provisions of 28 U. S. C. Section 1257 (2) confer jurisdiction upon this Court to review an appeal from said final judgment of the Supreme Court of Pennsylvania. The following cases are believed to sustain the jurisdiction of this Court: *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495; *Superior Films, Inc. v. Department of Education*, 346 U. S. 587; *Roth v. United States*, 354 U. S. 476; *Kingsley Books, Inc., v. Brown*, 354 U. S. 436; *Kingsley International Pictures Corp. v. Regents, etc.*—U. S.—, 79 S. Ct. 1362.

There is involved herein the constitutionality of the Pennsylvania Liquor Code, Act of April 12, 1951, P. L. 90, 47 Purdon's Statutes Sec. 1-101 et seq. Article IV thereof (47 Purdon's Statutes, Sec. 4-493) provides in pertinent part that it shall be unlawful:

> (10) For any licensee, his servants, agents or employes, except club licensees, to permit in any licensed premises or in any place operated in connection therewith, dancing, theatricals or floor shows of any sort, or moving pictures other than television, or such as are exhibited through machines operated by patrons by the deposit of coins, which project pictures on a screen not exceeding in size twenty-four by thirty inches and which forms part of the machine, unless the licensee shall first have obtained from the board a special permit to provide such entertainment, or for any licensee, under any circumstances, to permit in any licensed premises any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not. The board shall have power to provide for the issue of such special permits, and to collect a fee for such permits equal to one-fifth of the annual license fee but not less than twenty-five dollars ($25). All such fees shall be paid into the State Stores Fund. No such permit shall be issued in any municipality which, by ordinance, prohibits amusements in licensed places. Any violation of this clause shall, in addition to the penalty herein provided, subject the licensee to suspension or revocation of his permit and his license.

Section 494 of the Pennsylvania Liquor Code (47 Purdon's Statutes, Sec. 4-494) provides for penalties for violation of Article IV:

> (a) Any person who shall violate any of the provisions of this article, except as otherwise specifically

provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year.

(b) The right of the board to suspend and revoke licenses granted under this article shall be in addition to the penalty set forth in this section.

Also involved herein is Section 110.02D of the Regulation promulgated by the Pennsylvania Liquor Control Board, which provides in pertinent part:

No licensee shall require, request or permit any person engaged directly or indirectly as an entertainer in the licensed establishment or in any room or place connected therewith, to contact or associate with the patrons in such establishment, room or place for any purpose whatsoever * * *

The Supreme Court of Pennsylvania upheld the constitutionality of Section 4-493 (10) of the Pennsylvania Liquor Code, as well as Regulation 110.02D.

QUESTIONS PRESENTED.

Section 493 of Article IV of the Pennsylvania Liquor Code authorizes criminal penalties and revocation or suspension of the licenses of licensees who permit "lewd, or immoral, or improper" entertainment upon the licensed premises. Regulation 110.02D of the Pennsylvania Liquor Control Board forbids any licensee to permit entertainers in any licensed establishment "to contact or associate with the patrons * * * for any purpose whatsoever". The questions presented by this appeal are:

(1) Whether Section 493 of Article IV of the Pennsylvania Liquor Code is violative of the guarantees of freedom of expression and due process of the Fourteenth Amendment.

(2) Whether the Commonwealth of Pennsylvania in exercise of its right to regulate the dispensing of alcoholic beverages, Constitutionally has the power to prohibit expression, when such prohibition would, otherwise, be violative of the Fourteenth Amendment.

(3) Whether the entertainment in question is "obscene" under a Constitutional definition of obscenity.

(4) Whether Section 493 of the Pennsylvania Liquor Code is further violative of the Fourteenth Amendment in that it fails to provide for trial by jury of the issue of "obscenity".

(5) Whether Regulation 110.02D of the Pennsylvania Liquor Control Board also is violative of the Fourteenth Amendment's guarantee of freedom of expression.

STATEMENT OF THE CASE.

Appellant operates in the City of Philadelphia an establishment licensed under the Pennsylvania Liquor Code. On July 19, 1956 the Pennsylvania Liquor Control Board (hereinafter called "Board") issued Citation No. 503, 1956 to appellant. On November 1, 1956, the Board found that appellant had permitted "lewd, immoral and or improper" entertainment on the licensed premises on April 3 and 4, 1956, and that appellant permitted "entertainers to contact and or associate with patrons" on the licensed premises on April 3 and 4, 1956. The Board therefore suspended appellant's restaurant liquor license and amusement permit for 40 days.

The evidence before the Board was stipulated as evidence also before the Court of Quarter Sessions for Philadelphia County in the appeal to that court from the Board's order of suspension. The testimony of the enforcement officers of the Board was to the effect they visited appellant's premises on April 3, 1956 between 1:00 A. M. and 2:05 A. M., when two bartenders, twenty male patrons and two pianists were present. The officers observed "exotic" or "strip acts" by female performers on that date as well as on April 4, 1956, when the officers were present between 9:45 P. M. and 11:00 P. M., and when two bartenders, two pianists, a drummer and twenty-five male patrons were also present. The entertainment in question was described as dances of an "Egyptian type" with "bumps and grinds", the latter explained as moving the lower part of the performer's body backward and forward in both a fast and slow motion. No performances terminated with the nudity of the breasts or lower abdominal region of any of the dancers, but in each instance they finally appeared in abbreviated dancing costumes. A witness for appellant testified that the entertainers were employed through a licensed theatrical booking agency, and that the acts were known in

the trade as "exotic" acts. These acts were of the same type which the Board's officers had observed in other licensed premises throughout the City of Philadelphia. One officer further testified that one of the female entertainers "solicited" a drink for which he paid ninety cents. Appellant's witness testified that this was against orders.

The Court of Quarter Sessions for Philadelphia County dismissed appellant's appeal from the Board's order of suspension, and affirmed said order. The said court held the Pennsylvania statute Constitutional. It found, in the alternative, that the entertainment was lewd *or* immoral *or* improper. At the same time the said court noted that the test "improper" in the Pennsylvania Liquor Code might violate the Fourteenth Amendment if that were the *sole* test, since "this word may turn upon taste rather than decency". (Appendix 24a).

The Superior Court of Pennsylvania in its opinion noted that appellant contended (1) that the language of Section 493 of the Pennsylvania Liquor Code is unconstitutionally vague, (2) that the entertainment was not obscene, and (3) that appellant was entitled to a jury trial. It held against appellant on all of these contentions and, in addition, the Superior Court held that the Board's Regulation 140.021) was valid.

The Supreme Court of Pennsylvania, in response to the appellant's petition raising substantially questions 1, 3-5 presented herein,* granted an allocatur, allowing an appeal to it from the order of the Superior Court of Pennsylvania, "because of the important constitutional issues raised by appellants" (Appendix 1a). The Supreme Court's opinion states as the significant and determinative question in the case:

> * * * whether or not a state in *its regulation and privilege of dispensing alcoholic beverages* may condition that privilege by prohibiting types of conduct

* See page 5, *supra*.

and action that in another setting might be constitutionally protected. * * * (Appendix 3a).

The Supreme Court of Pennsylvania further stated the rationale of its decision as follows:

> * * * Our present inquiry is directed toward determining whether or not a state in exercising this power is limited and restricted by the constitutional guarantee to each individual of his right to freedom of speech and expression.
>
> In view of the historical background giving the state virtually an absolute control over the business of dispensing alcoholic beverages, the mere statement of the question compels a negative reply (Appendix 4a).

The Supreme Court of Pennsylvania further stated in its opinion:

> Nor are we any more receptive to appellants' contentions that the terms "lewd, immoral and/or improper" are so vague and indefinite as to permit punishment for incidents falling fairly within the protection of free speech in contravention of the *due process* clause of the Fourteenth Amendment. The privilege of selling alcoholic beverages conditioned upon the presentation of a certain quality of entertainment in establishments where the privilege is exercised is not, as we have determined, an incident falling fairly within the protection of free speech. For this reason, appellants' assumption that a state, in conditioning the issuance of a liquor license, may only prohibit entertainment in a licensed establishment that comes within the term "obscenity" as delineated by the United States Supreme Court in interpreting the state's limitations under the First and Fourteenth Amendments is unwarranted. If a state may prohibit

all entertainment in an establishment where liquor is sold without violating the First and Fourteenth Amendments, it may fairly prohibit entertainment which may not necessarily be considered obscene, without violating these same amendments (Appendix 6a-7a).

The Supreme Court of Pennsylvania while recognizing that statutes restricting freedom of expression must be definite, held that the instant case did not involve that type of statute (Appendix 6a). It further held that viewing the statutory terms "lewd, immoral or improper" unfettered by the confining interpretive requirements applied to statutes specifically restricting freedom of expression, the terms were not too vague to conform to the due process requirements of the Fourteenth Amendment (Appendix 8a). The Supreme Court of Pennsylvania affirmed the finding below that the entertainment in question violated Section 493 in that it was "lewd, immoral and/or improper". It noted that both the trial court and the Superior Court of Pennsylvania, equating the terms "lewd and immoral" with "obscene", found that the entertainment "was a predominant appeal to prurient interests" (Appendix 10a). As to Regulation 110.02D, the Supreme Court of Pennsylvania held that:

> * * * The grant of the privilege to dispense alcoholic beverages upon the condition that certain acts and conduct on the part of the employees or entertainers be prohibited while on the licensed premises *is outside the orbit of the constitutional provisions which assure to individuals the right to freedom of speech and expression.* (Appendix, 11a) (Emphasis supplied.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

A. The Constitutionality of the Pertinent Provisions of the Pennsylvania Liquor Code.

The entertainment in question falls within the protection of the Fourteenth Amendment's guarantee of freedom of expression. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495. The Pennsylvania statute in question, authorizing criminal and civil penalties for permitting either lewd or immoral or improper entertainment upon the licensed premises, must fall before the Fourteenth Amendment if the ambit of its broadest provision encompasses acts fairly within the protection of the guarantee of freedom of expression of the Fourteenth Amendment. *Winters v. People of State of New York*, 333 U. S. 507; *Stromberg v. People of California*, 283 U. S. 359. This Court has struck down numerous state statutes involving limitations on freedom of expression similar to those in the Pennsylvania statute herein upon the ground that the standards used were not sufficiently precise to satisfy the minimum requirements of due process. For example, in *Superior Films v. Department of Education*, 346 U. S. 587, this Court invalidated the test "immoral", one of the alternative tests of the instant Pennsylvania statute. In *Gelling v. Texas*, 343 U. S. 960, the test "sexually immoral" was invalidated by this Court. See also *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 270; *Times Film Corp. v. Chicago*, 355 U. S. 35.

We submit that the Pennsylvania statute insofar as it embodies the tests "immoral" and "improper" is void upon its face. The statute is so vague and indefinite in form as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of freedom of speech. *Winters v. People of State of New York*, 333 U. S. 507, 510-11; *Stromberg v. People of State of California*, 283 U. S. 359, 369.

It is submitted that the Pennsylvania statute is void on its face under the doctrine of the aforementioned decisions. The decision of the Supreme Court of Pennsylvania should be reversed, in addition, for the further reason that it rests upon alternative findings of the court below that the entertainment was *immoral* or *improper*—Constitutionally invalid standards, *Stromberg v. People of State of California, supra.*

We respectfully suggest that on this question presented the Court may find this case an appropriate one for reversal without argument.

B. The Conflict Between the State's Power to Regulate the Dispensing of Alcoholic Beverages and the Guarantee of Freedom of Expression and of Due Process Under the Fourteenth Amendment.

The opinion of the Supreme Court of Pennsylvania disposes of the conflict between the state's power to regulate the dispensing of alcoholic beverages, and guarantee of freedom of expression and of due process secured by the Fourteenth Amendment by making supreme the state's power. The Supreme Court of Pennsylvania has thus held that (a) merely because the dispensing of alcoholic beverages is involved the state may interdict speech and expression which *otherwise* would have had protection under the Fourteenth Amendment, and (b) that a state statute may thus be valid which *otherwise* would fall before the Fourteenth Amendment.

In *Commonwealth v. Blumenstein*, 396 Pa. 417, the Supreme Court of Pennsylvania declared Constitutionally invalid Section 528 of the Pennsylvania Penal Code of 1939, which makes it a misdemeanor to exhibit motion pictures "of a lascivious, sacrilegious, obscene, indecent or immoral nature and character," or such as might tend to corrupt morals". The contrast between the decision of the Supreme Court of Pennsylvania in *Commonwealth v. Blumenstein, supra*, with its decision in the instant case demonstrates the

emphasis which the Supreme Court of Pennsylvania has chosen to put upon its view in this case of the absolute right of the state, under the guise of an exercise of the police power to control the dispensing of alcoholic beverages, to prohibit Constitutionally protected expression. Under this view it could be very well contended that a state would have the power to prohibit, for example, all or certain types of political, literary or scientific discussion upon the licensed premises.

We feel that this unique rationale of the decision of the Supreme Court of Pennsylvania which has wide-reaching effect, constitutes an important question of federal Constitutional law which should be decided by this Court.

C. The Entertainment in Question Was Protected by the Guarantee of Freedom of Expression.

The Supreme Court of Pennsylvania affirmed the determination by the Superior Court of Pennsylvania (as well as by the Court of Quarter Sessions for Philadelphia County) that the entertainment in question was "obscene". We submit that the entertainment involved is not obscene within the meaning of that concept embodied in this Court's opinion in *Roth v. United States*, 354 U. S. 476. This Court there noted (at 487):

> However sex and obscenity are not synonymous. Obscene materia is material which deals with sex in a manner appealing to prurient interest.

Elaboration of this statement is contained in the Court's note (at 487) in *Roth v. United States* where reference is made to the definition of obscenity contained in the Model Penal Code, Sec. 207.10(2) (Tentative Draft No. 6, 1957):

> * * * A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a *shameful* or *morbid* interest in *nudity, sex* or *excretion*, and if it goes substantially beyond *customary* limits of

candor in description or representation of such matters. (Emphasis supplied.)

As pointed out in the Comments in Section 207.10 (p. 31) of the Tentative Draft No. 6 of the Model Penal Code of the American Law Institute: "Our civilization tolerates much that experts or particular segments of the population might regard as appealing primarily to prurient interests." We submit that the entertainment involved, like the material involved in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 482, is not obscene. It does not contain a predominant appeal to a *shameful* or *morbid* interest in sex or go beyond the customary limits of candor. Nudity and excretion are not involved.

The entertainment in question, we submit, while not of a high aesthetic order, nevertheless cannot be equated to the "hardcore pornography" which was before the Court in *Roth v. United States*. Nor, in the language of Chief Justice Warren in *Roth v. United States*, 354 U. S. at 496 was appellant herein engaged in the "commercial exploitation of the *morbid and shameful* craving for materials with prurient effect". (Emphasis supplied.)

We submit that the entertainment in question was prohibitable by the state only if it was "obscene" in the sense that it was not protected by the federal Constitution. Since the determination whether or not the particular expression herein was "obscene" has important Constitutional implications, it should be subject to review and decision by this Court. In *Kingsley International Pictures Corp. v. Regents, etc.*, — U. S. —, 79 S. Ct. 1362, Mr. Justice Frankfurter (concurring) noted with regard to the due process clause that this Court "cannot escape such instance-by-instance, case-by-case application of that clause in all the variety of situations that come before this Court".

D. Appellant Was Entitled to Trial by Jury of the Issue of Obscenity.

The Supreme Court of Pennsylvania rejected appellant's contention that it was entitled to a trial by jury of the issue of "obscenity" (Appendix, 7a). In *Roth v. United States*, 354 U. S. 476, this Court pointed to the function of the jury in resolving issues of fact in this difficult area of the law. Mr. Justice Brennan's opinion (dissent) in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 447-448 discusses the relationship between a test of obscenity in terms of community standards and the functioning of the jury as the embodiment of community standards. There is a great difficulty in leaving the determination of obscenity to a judge or administrator. *Roth v. United States*, 237 F. 2d 796, 822 (C. A. 2, 1956); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 532.

We submit that the issue whether the imposition of a penalty provided for by the Pennsylvania Liquor Code can stand, despite the absence of trial by jury of the issue of obscenity, is an important question of federal Constitutional law which should be decided by this Court.

E. The Board's Regulation in Question Is Invalid.

The issue of the Constitutional invalidity of Regulation 110.021 is interrelated with the basic issue of the extent of the state's police power to prohibit or limit expression because alcoholic beverages are being dispensed upon the licensed premises.

In answer to appellant's contention that such Regulation violates rights of freedom of expression, the Supreme Court of Pennsylvania said:

> • • • The principles, hereinbefore discussed in connection with Section 493 of the Code, relating to the *absolute* control of the state over the use and sale of alcoholic beverages completely refute this contention. (Appendix, 10a-11a) (Emphasis supplied.)

CONCLUSION.

The Pennsylvania Statute is void on its face. We submit that this Court may summarily reverse upon this ground alone.

If the Court does not agree with this submission, then we urge that the instant appeal is certainly an appropriate one for decision after full argument, upon the following grounds: The instant appeal raises important questions in the area of Constitutional protection of freedom of expression, as well as in the area of the relationship between the police power of a state and Constitutionally protected liberties, where the dispensing of liquor is involved. It raises, further, the effect of the decision in *Roth v. United States* on expression which is not obscene. It raises, finally, the issue of whether the determination of expression as obscenity must Constitutionally be made only by the final arbiter of community standards,—the jury.

Respectfully submitted,

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Appendix.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

These appeals challenge the legality and propriety of the action of the Pennsylvania Liquor Control Board (herein called the Board) in suspending [1] the liquor licenses and amusement permits of the appellants, Tahiti Bar, Inc. and Lehigh Casino, Inc., for alleged violations of the Liquor Code [2] and a regulation of the Board enacted pursuant thereto. The citations upon which the suspensions were based charged that appellants "1. . . . by [their] servants, agents or employes permitted lewd, immoral and/or improper entertainment on the licensed premises . . ." in violation of section 493 of the Code, and, "2. . . . by [their] servants, agents or employes permitted entertainers to contact and/or associate with patrons on the licensed premises . . ." in violation of the Board's Regulation 110. The suspensions were affirmed on separate appeals to the Court of Quarter Sessions for the County of Philadelphia and the Superior Court.[3] Because of the important constitutional issues raised by appellants, we granted an allocatur.[4]

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1. The Board suspended Lehigh Casino's liquor license and amusement permit for a period of sixty days, Tahiti Bar's liquor license and amusement permit for a period of forty days.

2. Act of April 12, 1951, P. L. 90, art. I, § 101 *et seq.*, 47 PS § 1-101, as amended.

3. 186 Pa. Superior Ct. 214, 223, 142 A. 2d 491, 495.

4. The appeals were argued jointly before this Court. Counsel for Tahiti Bar directed his argument primarily towards attacking Section 493 of the Liquor Code; counsel for Lehigh Casino urged the illegality of Regulation 110. For this reason, and because identical constitutional issues are raised, both appeals will be disposed of in a single opinion.

We will initially consider appellants' objections to Section 493 of the Code. Section 493 (47 PS § 4-493) provides in material part that it shall be unlawful "(10) . . . for any licensee, under any circumstances, to permit in any licensed premises *any lewd, immoral or improper* entertainment, regardless of whether a permit to provide entertainment [required by this section] has been obtained or not. . . . Any violation of this clause shall . . . subject the licensee *to suspension* or revocation *of his permit and his license.*" (Emphasis supplied.) Enforcement officers of the Board stated that they visited the Tahiti Bar on April 3, 1956 and April 4, 1956. They testified in substance that on those two occasions they observed seven "strip acts" which involved the removal of substantially all of the female performers' apparel, and that "bumps and grinds" were performed by "moving the lower part of [their] body backwards and forward [in] both a fast and slow motion." The same officers visited the Lehigh Casino on May 24, 1956 and May 26, 1956. The performances were similar to those observed at the Tahiti Bar. Neither appellant contradicted nor questioned the enforcement officers' factual description of the performances. Appellants admit that the performances in both establishments were almost identical, involving in some instances, the same performers.

Appellants urge that Section 493 violates the First and Fourteenth Amendments of the U. S. Constitution[5] in that it abridges freedom of speech and expression and that the terms "lewd, immoral and/or improper" are so vague and indefinite as to permit punishment for incidents

5. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U. S. CONST. amend. I. ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 1.

falling fairly within the protection of free speech in contravention of the *due process* clause of the Fourteenth Amendment. Appellants assume, without discussion, that Section 493 is primarily directed toward prohibiting and restricting certain types of entertainment when such entertainment falls within the term expression as included within the free speech guarantee of the First and Fourteenth Amendments. In so doing, appellants misconceive the basic issue upon which the validity of Section 493 rests. The significant and determinative question is whether or not a state in *its regulation of the privilege of dispensing alcoholic beverages* may condition that privilege by prohibiting types of conduct and action that in another setting might be constitutionally protected. It is within this narrow framework that Section 493 must be reviewed.

There is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages. See: *Goesaert v. Cleary*, 335 US 464, 465, 69 S. Ct. 198. Bearing in mind the "alleged noxious qualities and extra-ordinary evils" traditionally assigned to the use of alcoholic beverages, it is no longer open to question that a state may prohibit the manufacture, gift, purchase, sale, possession or transportation of alcoholic beverages within its borders. This power of prohibition includes the lesser power of regulation, and a state may adopt such measures as are reasonably appropriate or needful to render the exercise of that power effective. See: *Crane v. Campbell*, 245 US 304, 38 S. C. 98 [and cases therein cited]; *State Board of Equalization of California et al. v. Young's Market Co. et al.*, 299 US 59, 63, 57 S. C. 77; *Ziffrin v. Reeves*, 308 US 132, 138, 60 S. C. 163. A state may, and generally does, require a license conditioned upon compliance with certain specified general requirements and personal qualifications before it will authorize an individual to sell alcoholic beverages. The license

so issued is not absolute, and may be terminated or suspended by a state even though it may have been valid when initially issued. *Mahoney v. Joseph Triner Corp.*, 304 US 401, 58 S. C. 952; *Premier-Pabst Sales Co. v. Grosscup*, 298 US 226, 56 S. C. 754. Our present inquiry is directed toward determining whether or not a state in exercising this power is limited and restricted by the constitutional guarantee to each individual of his right to freedom of speech and expression.

In view of the historical background giving the state virtually an absolute control over the business of dispensing alcoholic beverages, the mere statement of the question compels a negative reply. An individual has no constitutional right to engage in the business of selling alcoholic beverages. The conduct of such a business is lawful only to the extent that it is made so by the Liquor Code. *Cavanaugh v. Gelder*, 364 Pa. 361, 364, 72 A. 2d 85, *cert. denied*, 340 US 822; *Com. v. Bienkowski*, 137 Pa. Superior Ct. 474, 9 A. 2d 169. See *Crane v. Campbell*, supra. Section 493 does not purport *per se* to control, regulate, sanction or censor the type of entertainment an establishment may present to its patrons. Section 493 merely provides that, if a certain type of entertainment is presented, the privilege of dispensing alcoholic beverages, to which an individual has no constitutional right, will be withdrawn. This does not constitute a mere semantic distinction. Section 493 is a regulation of the liquor business, and, as such, is required only to bear a reasonable relation to the evil sought to be controlled; the right of the individual to freedom of speech and expression is not involved.[6] This section does not

6. Appellants neither raised nor discussed the question as to whether a statute prohibiting "lewd, immoral or improper" entertainment in licensed establishments has a reasonable relation to the state's power to prohibit or regulate the liquor business for the protection of the health, safety, morals or general welfare of its citizens. Assuming the statute to be valid in all other respects, we have no doubt of its validity on this point. *See: Cavanaugh v. Gelder*, supra.

constitute an abridgement of the freedom of speech of the individual, but rather, an abridgement of a privilege granted solely by the state. That in order to secure and retain this privilege, an individual may be incidentally required to modify the exercise of certain rights does not constitute an unconstitutional deprivation of those rights by the issuing authority.

In *Cavanaugh v. Gelder*, supra, this Court upheld a regulation of the Board which required liquor licensees to obtain an amusement permit as a pre-requisite to the use of television in licensed establishments and to pay one-fifth of the annual liquor license fee for the privilege of presenting such entertainment. Although the issue of free speech was apparently not directly raised, the language of the opinion is most germane in rejecting appellants' present contention. We therein approved the following language of the court below: (pp. 363-366). " 'Plaintiffs' contentions are predicated on the fallacy that the license required for the privilege of providing televised, and no other form of entertainment, in establishments licensed under the Liquor Control Act is in a category entirely separate and distinct from the license required to be held for the privilege of selling intoxicating liquors. With this we cannot agree. On the contrary, it is the restaurant licensee who is granted under the Liquor Control Act the additional privilege, upon the payment of a further license fee, of offering certain forms of entertainment to his patrons. The legislature has the power to deny this additional entertainment privilege to the Board's licensees . . . just as under the Act of July 9, 1881, P. L. 162 (47 PS 181), it denied licenses for the sale of spirituous or malt liquors to proprietors of any theater, circus, museum or other place of amusement or to premises for the sale of such liquors which had a passage or communication to or with the same.' . . . 'The power of the state to regulate the sale of intoxicating liquors, and, in the exercise of that power, to authorize the granting of

licenses to fit persons under such conditions as the legislature may impose is too well settled to be open to discussion.' Accordingly, since the state may absolutely forbid or may license the sale of intoxicating liquors, it may impose such conditions upon the granting of licenses as it sees fit, and one who accepts such license must be deemed to consent to all proper conditions and restrictions which have been or may be imposed by the legislature in the interest of the public morals or safety. . . . 'A transaction which is innocuous, if considered separately, may nevertheless be included in the scope of a general prohibitory measure designed to accomplish a purpose well within an admitted governmental power. . . . Admittedly, plaintiffs exhibit televised entertainment in their licensed establishments, presumably for the purpose of attracting and holding patrons and thereby increasing sales. *The legislature had the power to absolutely forbid, or to grant under specified conditions, licenses for the sale of intoxicating liquors. It had the power to absolutely forbid or to permit under specified conditions, entertainment in licensed establishments.*' . . .'' (Emphasis supplied) Section 493 does not violate the right of free speech and expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Nor are we any more receptive to appellants' contentions that the terms "lewd, immoral and/or improper" are so vague and indefinite as to permit punishment for incidents falling fairly within the protection of free speech in contravention of the *due process* clause of the Fourteenth Amendment. The privilege of selling alcoholic beverages conditioned upon the presentation of a certain quality of entertainment in establishments where the privilege is exercised is not, as we have determined, an incident falling fairly within the protection of free speech. For this reason, appellant's assumption that a state, in conditioning the issuance of a liquor license, may only prohibit entertainment in a licensed establishment that comes within the

term "obscenity" as delineated by the United States Supreme Court in interpreting the state's limitations under the First and Fourteenth Amendments is unwarranted.[7] If a state may prohibit *all* entertainment in an establishment where liquor is sold without violating the First and Fourteenth Amendments, it may fairly prohibit entertainment which may not necessarily be considered obscene without violating these same amendments.[8]

Nor, as appellants intimate, are we confronted with a criminal statute requiring strictness of interpretation as to vagueness and indefiniteness under the *due process* clause of the Fourteenth Amendment, itself. A proceeding to suspend or revoke a license under the liquor laws has always been considered civil and administrative and not criminal in nature. *Summit Hill Rod and Gun Club Liquor License Case*, 184 Pa. Superior Ct. 584, 135 A. 2d 781; *Com. v. Lyons*, 142 Pa. Superior Ct. 54, 15 A. 2d 851; *Com. v. McMenamin*, 122 Pa. Superior Ct. 91, 184 Atl. 679. As Mr. JUSTICE DOUGLAS, in rejecting a similar contention in upholding the suspension of the license of a wholesale dealer under the Federal Alcohol Administration Act (49 Stat. 977, 27 USC § 201) in *Black v. Magnolia Liquor Co.*, 355 US 24, 26, 78 S. C. 106, stated: "The Court was constrained to read the Act narrowly, as it conceived it to be penal in nature when it forfeited a permit to do business. *But we deal here with remedial legislation whose language should be given hospitable scope. . . . The will of Congress would be thwarted if we gave the language in question the strictest construction possible.*"[9]

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7. See, e.g., *Roth v. United States*, 354 US 476, 77 S. C. 1304.

8. Appellants also argue that "an obscenity statute where no right of trial by jury exists is probably unconstitutional." The present statute is not an obscenity statute. It is a Liquor Code providing for the revocation of a liquor license where a right of trial by jury has never been afforded. *Premier Cereal & Beverage Co. v. Pennsylvania Alcohol Permit Board*, 292 Pa. 127, 140 Atl. 858.

9. Section 205(f) of the Federal Act itself provides that "It shall be unlawful . . . To publish or disseminate . . . any advertise-

Viewing the statutory terms "lewd, immoral and improper" unfettered by the confining interpretive requirements applied to criminal statutes and statutes specifically designed to restrict freedom of speech and expression, are these terms still too vague to conform to the *due process* requirements of the Fourteenth Amendment? We think not. In *Miller v. Strahl*, 239 US 426, 36 S. C. 147, the validity of a state statute requiring a hotel proprietor to do "all in [his] power" to save guests from harm in case of fire, was upheld against charges of being vague and indefinite. The Court pertinently stated: (p. 434) "Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that 'men are differently constituted', some being 'abject cowards, and few only are real heroes;' that the brains of some people work 'rapidly and normally in the face of danger while other people lose all control over their actions.' It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of 'all in one's power' as determined by the circumstances?" Such rules of conduct requiring individuals to pattern their actions upon general conclusionary terms are legion. "Tests of this character are not metaphysical, subjective or abstract. They are practical, objective and concrete. The standard they establish is as certain as it is pragmatic. They allow a jury to determine whether, in the light of past conduct, a person's actions meet the standard of reasonableness, practicability or the like. Standards of this type have been upheld constantly. [citing cases]" *Mallatt v. Ostrander Ry. & Timber Co.*, 46 F. Supp. 250, 254.

Under the liquor laws of this Commonwealth, licenses have been denied, suspended or revoked under such pro-

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ment of distilled spirits, wine, or malt beverages . . . unless such advertisement is in conformity with such regulations . . . (4) as will prohibit statements that are disparaging of a competitor's product or are false, misleading, obscene, or indecent."

visions as "upon any . . . sufficient cause shown"[10] and because the applicant was not a "person of good repute."[11] Even if it were conceded that the term "improper" is too vague to satisfy *due process* requirements, no such question would arise as to the terms "lewd and immoral." We believe that they are as precise, if not more so, than the instances cited. As the Superior Court recently stated in *Com. v. Randall;* 183 Pa. Superior Ct. 603, 611, 133 A. 2d 276, allocatur refused, 184 Pa. Superior Ct. XXVIII, *cert. denied* 355 US 954: "We have not so cast ourselves adrift from that code nor are we so far gone in cynicism that the word 'immoral' has no meaning for us. Our duty, as a court, is to uphold and enforce the laws, not seek reasons for destroying them . . . unless words of such seeming generality as 'moral' and 'immoral' were valid in statutes, government itself would become impossible . . . The constitutionality of similar statutes defining crimes in general terms has been upheld by many courts where the general terms used in the particular statute get precision from common standards of morality prevalent in the community . . . The term 'moral turpitude' has been held adequate to satisfy even the strict rule applicable to criminal statutes: *Jordan v. DeGeorge,* 341 US 223, 232, 71 S. Ct. 703, 708. The term 'good moral character' as used in the immigration and nationality laws has frequently been applied to the courts. The measure applied is the 'common standard of morality' prevalent in the community: *Estrin v. U. S.,* 2 Cir., 80 F. 2d 105; or the 'common conscience' of the community: *Johnson v. U. S.,* 2 Cir., 186 F. 2d 588, 590." Viewed in its entirety, the terminology employed in Section 493 is neither vague nor indefinite and does not violate the *due process* clause of the Fourteenth Amendment.

10. *Reiter Liquor License Case,* 173 Pa. Superior Ct. 552, 98 A. 2d 465; *Com. v. Lyons,* 142 Pa. Superior Ct. 54, 15 A. 2d 851; *Revocation of Mark's License,* 115 Pa. Superior Ct. 256, 176 Atl. 254.

11. *Rizzo Liquor License Case,* 174 Pa. Superior Ct. 457, 101 A. 2d 180.

Nor do we have any hesitation in affirming the determination of the courts below that the entertainment in question violated Section 493 in that it was "lewd, immoral and or improper." Both the trial court and the Superior Court, equating the terms "lewd and immoral" with "obscene", found that the entertainment "was a predominant appeal to prurient interests." Thus both tribunals, applying the test associated with attempts on the part of a state to restrict freedom of speech and expression, *which* we reiterate *is not presently involved*, found that appellants had violated Section 493 and that their licenses had been properly suspended. Our review of the record demonstrates the propriety and correctness of this determination. No purpose would be served by a repetition of the factual description of the entertainment contained in the record to demonstrate, as stated by the Superior Court, that it "was lewd or obscene as well as immoral under any definition of these terms."

Appellants next attack the validity and constitutionality of the Board's regulation 110, the relevent portion of which provides: "No licensee shall require, request or permit any person engaged directly or indirectly as an entertainer in the licensed establishment or in any room or place connected therewith, to contact or associate with the patrons in such establishment, room or place for any purpose whatsoever . . ."[12] Appellants urge that such regulation is violative of an individual's right of freedom of speech and expression. The principles, hereinbefore discussed in connection with Section 493 of the Code, relating to the absolute control of the state over the use and sale of

12. Section 110.02 D. There seems to be no doubt that the entertainers in both the Tahiti Bar and the Lehigh Casino did "contact" or "associate" with patrons. The enforcement officers testified that in the Tahiti Bar at least one female entertainer "solicited a drink of Canadian Club for which I paid ninety cents" and later associated with other patrons and that in the Lehigh Casino "We observed these girls [the entertainers] drinking and mingling with male patrons at the bar".

alcoholic beverages completely refute this contention. Inasmuch as the state, in the exercise of its police power, may interdict the presentation of *any* entertainment whatsoever in an establishment licensed to sell alcohol beverages, it follows as a natural consequence that, if the state does permit entertainment, the state may prescribe the type and character of such entertainment as well as the conduct of the entertainers while on the licensed premises without impinging upon the constitutional guarantee of the right to freedom of speech and expression. The sole impediment to such prescription by regulation is that the regulation must bear a reasonable relationship to the eradication of the evils so frequently and historically associated with the use and sale of alcoholic beverages. The grant of the privilege to dispense alcoholic beverages upon the condition that certain acts and conduct on the part of employees or entertainers be prohibited while on the licensed premises is outside the orbit of the constitutional provisions which assure to individuals the right to freedom of speech and expression. When the licensee accepts the imposition of such a condition as a prerequisite to the grant of the license he, in effect, voluntarily acquiesces in the limitation of his right to freedom of speech and expression to the extent implicit in the acts and conduct prohibited by the terms of the condition. This is a classic example of an instance wherein the state, acting for the common good in an area traditionally productive of grave social evils, may impose upon those who seek and are granted the right to transact business in that area *reasonable* limitations and restrictions on acts and conduct which, historically, have given rise to these social evils without offending the constitutional provision as to freedom of speech and expression.

Appellants further argue that, inasmuch as the Board's regulation forbids a licensee to permit entertainers "contacting" or "associating" with male patrons on the licensed premises, the regulation goes far beyond Section 493(25) of the Code and constitutes an unlawful assump-

tion of legislative power by the Board. Such an argument is unsound. Appellants misconstrue the evils sought to be eradicated and err in their assumption that by this section the legislature intended to completely define *all* the regulation necessary to remedy the evils. Section 493(25) prohibits the *hiring* of female employees "*for the purpose of*" the enticement of customers, the encouragement of such customers to drink and the making of assignations for improper purposes. It is directed at only *one* type of conduct on the part of the licensee which may lead to the evils sought to be eliminated; evils historically associated with the sale of alcoholic beverages. To hold that the legislature, by such a statutory provision, intended thereby to preclude the Board from the adoption of any regulation prohibiting *other* types of conduct on the licensed premises which might lead to the same evils is clearly without justification. If appellants' theory be correct, a licensee could knowingly permit females to frequent and utilize the licensed premises for the purposes interdicted by the statute, or could knowingly permit a female employee *not hired for such purposes* to indulge in such practices, or could hire a male employee to encourage customers to drink liquor or make assignations for improper purposes for a female and the Board would be completely helpless to circumscribe such conduct by regulation. The legislature never intended by Section 493(25) either to define the whole area of regulations necessary to cope with evils sought to be eliminated nor to place the Board within the "strait-jacket" of the narrow and confining limitations herein advocated by appellants.

Futhermore, the instant regulation is amply supported by statutory authority. The Code itself includes a legislative mandate that the courts give a liberal construction to its provisions.[13]

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13. "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth . . . *and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose*". (Emphasis supplied). Section 104 of the Code, 47 PS § 104.

The Code grants to the Board the power to adopt regulations on specific subjects among which is: "The issuance of licenses and permits and the conduct, management, sanitation and equipment of places licensed or included in permits" (Section 208(h), supra, 47 PS § 2-208). After an enumeration of the Board's general powers, the Board was granted the power "to do all such things and perform all such acts as are deemed necessary or advisable for the purpose of carrying into effect the provisions of this act and the regulations made" without "in any way limiting or being limited" by the enumeration of the general powers conferred (Section 207(h), supra, 47 PS § 2-207). Section 207(i), supra, further empowers the Board "From time to time, to make such regulations not inconsistent with this act as it may deem necessary for the efficient administration of [the] act". These provisions make evident the power of the Board to adopt any *reasonable* regulation the purpose of which is the elimination or restriction of the evils delineated in Section 493(25), supra, without being held to have usurped the power of the legislature.

Appellants next question the reasonableness of this regulation in that it applies to *all* entertainers whereas, according to appellants, the sole evil to be remedied "is the enticing by females of unwary males in bars and of making assignations for improper purposes". Although we agree that the principal thrust of this regulation is to control the proscribed extra-curricular activities of female entertainers, we do not believe that *only* a female may be guilty of the conduct prohibited by this regulation nor that the Board is arbitrary in its assumption that a male entertainer might be guilty of the same conduct. Nothing in this regulation offends our sense of its reasonableness in this respect.

Lastly, appellants urge that the regulation is too broad in its scope in that it prevents entertainers "from discussing innocent topics over a drink" with their husbands,

wives, agents or friends, when this is not the evil sought to be remedied. Aside from the fact that there is no evidence whatsoever that such were the instant circumstances, we find no invalidity on this ground. A regulation which contained the excepted conduct on the part of the entertainers advocated by appellants would by its very terms doom the regulation and render impossible its execution and enforcement. While the difficulty of enforcement alone is insufficient to breathe validity into an otherwise invalid regulation, yet such difficulty is extremely significant when the instant regulation is viewed in its proper setting. This regulation is directed against a well-defined group, namely entertainers in licensed establishments; its purpose is the abolition of certain well-recognized and prevalent evils historically associated with the sale and consumption of alcoholic beverages on licensed premises. Bearing in mind the evils sought to be controlled, the obvious difficulty of enforcement of a regulation containing such an exception and the limited class against which the regulation is directed, we do not believe it is unreasonable to deprive that class of the right "to discuss innocent topics over a drink" with wives, husbands, agents or friends while employed as entertainers in licensed establishments.[14]

Both Sections 493 of the Code and regulation 110 of the Board are valid and constitutional. The action of the Board in suspending appellants' licenses and permits for the violations was properly sustained.[15]

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14. The Lehigh Casino objects to the innuendo of the Superior Court that the entertainers in its establishment were "nude or scantily clothed" while mingling with patrons because of the Superior Court's *per curiam* affirmance of the suspension of its license and permit on the authority of the Tahiti Bar case where such conditions apparently existed. This factual difference is neither material or significant for present purposes. That the entertainers be nude or scantily clothed is not a *sine qua non* for a violation of regulation 110.

15. Appellants also argued that since regulation 110 relates only to amusement permits, only such permits should be suspended. Aside from the fact that the Board also found appellants had violated Section 493(10) which expressly provides for the suspension of a liquor

Orders affirmed. Costs on appellants.

Mr. Justice McBride did not participate in this decision.

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license, Section 471 of the Code (47 PS § 4-471) provides: "Upon learning of any violation of this act or any laws of this Commonwealth relating to liquor, alcohol or malt or brewed beverages, or of *any regulation* of the board adopted pursuant to such laws, . . . the board . . . if satisfied that any such violation has occurred . . . shall immediately suspend or revoke the license. . . ." (Emphasis supplied). As to appellants' "clear distinction" between a liquor license and an amusement permit, see *Cavanaugh v. Gelder*, supra.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

This is an appeal by Tahiti Bar, Incorporated, from an order of the court below dismissing an appeal by the licensee from an order of suspension entered by the Pennsylvania Liquor Control Board. The court below found as a fact "that the entertainment in each instance here was lewd, immoral or improper" and that "The entertainment in each of these cases was a predominant appeal to prurient interest." The entertainment consisted of various dance routines described as "bumps and grinds" by female entertainers who had removed practically all of their clothing. Article IV of the Liquor Code deals with licenses and regulations. Section 493 (47 PS § 4-493) provides in pertinent part that it shall be unlawful: "(10) . . . for any licensee, under any circumstances, to permit in any licensed premises any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not,"

The defendant contends (1) that the language is unconstitutionally vague, (2) that the entertainment was not obscene and (3) that it was entitled to a jury trial.

At the outset it should be recognized that this case involves the temporary suspension of a liquor license. It is not a case where a book, magazine or moving picture has been restrained before its distribution or exhibition. It is not even a case where a criminal penalty is involved. It is difficult for us to comprehend how an "exotic" dance is in any way related to freedom of speech or press. The liquor business is unlawful and its conduct is only lawful to the extent and in the manner permitted by statute: *Sawdey Liquor License Case*, 169 Pa. Suprior Ct. 214, 82 A. 2d 713. A liquor license is a privilege and not a property right: *Cavanaugh v. Gelder*, 364 Pa. 361, cert. den. 340 U. S. 822, 72 A. 2d 85; *Spankard's Liquor License Case*, 138 Pa. Superior Ct. 251, 10 A. 2d 899. In the granting and revoca-

tion of liquor licenses under the police power, the Commonwealth may establish the regulations and terms upon which the license may be granted and retained: *Com. v. Speer*, 157 Pa. Superior Ct. 197, 42 A. 2d 94.

In *Cavanaugh v. Gelder*, supra, at page 366, our Supreme Court said: "It [the legislature] had the power to absolutely forbid or to permit under specified conditions, entertainment in licensed establishments."

Was the language used in the Liquor Code, prohibiting entertainment upon the licensed premises which was "*lewd, immoral or improper*" (emphasis added), so vague as to be prohibited by the first and tenth Amendments to the Federal Constitution? We think not. The court below treated these words as interchangeable synonyms for "obscene." Certainly the word "lewd" is a synonym for "obscene" and vice versa.

In *Roth v. United States, Alberts v. California*, 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304, it was held that obscenity is not within the area of constitutionally protected speech or press. In the majority opinion written by Mr. Justice BRENNAN, he said (77 S. Ct. 1304, 1309): "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. Ed. 1031: '. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the *lewd* and *obscene* . . . . It has been well observed that such utterances are no essential part of any exposition of

ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'" (Emphasis added.)

In *Com. v. Randall*, 183 Pa. Superior Ct. 603, allocatur refused, 184 Pa. Superior Ct. , cert. den. 75 S. Ct. 539, 133 A. 2d 276, we recently held that the Act of June 3, 1953, P. L. 277, § 1, 18 PS § 4532, which provides that whoever by any act corrupts or tends to corrupt the morals of any child under the age of 18 years is guilty of a misdemeanor, is not so vague and indefinite that it violates the Federal Constitution. In that case, at page 610, we said: "In the censorship cases the courts were concerned not only with the question of whether the language in the statute was so vague and indefinite as to constitute a denial of due process but also with that part of the Constitution which has to do with the right of free speech. In the present case we are not concerned with the freedom of speech provision. We are concerned only with the question of whether the statute which prohibits any acts which corrupt or tend to corrupt the morals of a child under 18 years of age is sufficiently clear and definite to advise the public of the proscribed conduct."

The statute involved in the *Roth* case was the federal obscenity statute which declares to be unmailable "Every *obscene, lewd, lascivious, or filthy* book, pamphlet, picture, paper, letter, writing, print or other publication of an *indecent character*; . . ." (Emphasis added.) In the *Alberts* case, the California Penal Code made anyone who "Writes, . . . publishes . . . any *obscene or indecent* writing, paper, or book . . . ." guilty of a misdemeanor. The Supreme Court of the United States found little difficulty with the use of the language in either statute. The words used in the Pa. Liquor Code provide substantially the same concept as do the words of the federal statute or the California statute and the words, taken together, are

sufficiently precise. We are of the opinion that the words used in the Liquor Code, when taken together, are sufficiently clear to enable any ordinary person to understand what kind of entertainment is proscribed. The court below, in its opinion, expressly found that the entertainment "was a predominant appeal to prurient interest." In its opinion the court below made express reference to the *Roth* and *Alberts* cases hereinbefore referred to and we are convinced that the proper standard for evaluating the entertainment was used.

The entertainment, as shown by undisputed evidence, was lewd or obscene as well as immoral under any definition of these terms. In *Roth v. U. S., supra*, at page 1309, Mr. Justice Brennan said: "It is strenuously urged that these obscenity statutes offend the constitutional guaranties because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*. In Roth, the trial judge instructed the jury: 'The words "obscene, lewd and lascivious" as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.' (Emphasis added.) In Alberts, the trial judge applied the test laid down in People v. Wepplo, 78 Cal. App. 2d Supp. 959, 178 P. 2d 853, 855, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.' (Emphasis added.) It is insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in Beauharnais v. People of State of Illinois, supra, 343 U. S. at page 266, 72 S. Ct. at page 735: 'Libelous utterances not being within the area

of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.' " If we should employ the standard suggested by the appellant, being that of the American Law Institute, § 207.10(2), we would still conclude that the entertainment in this case was lewd or obscene. In A. L. I. "obscenity" is defined as follows: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." Customary candor certainly does not include "bumps and grinds" by a female entertainer who is practically unclothed, in a bar late at night when we assume the moral fiber of the male patrons has been substantially weakened by the introduction of copious quantities of alcohol. The A. L. I. further provides that it shall be admissible to show the following factors:

"(a) the character of the audience for which the material was designed or to which it was directed." In the present case, the audience consisted of male patrons of an ordinary bar. Under this standard, a select audience of college professors or aesthetics engaged in watching esoteric dances might view nude dancers engaging in erotic motions and gestures and such a performance, under the circumstances, would not be considered obscene. There is no suggestion in the record that the purpose of this entertainment was other than to appeal to the prurient interest of the patrons of the bar or that the character of the patrons of this bar was in any way special or entitled to unusual consideration.

"(b) . . . .

"(c) artistic, literary, scientific, educational or other merits of the material." This is an obvious effort to protect works of scientific or artistic merit which might otherwise be considered as obscene by illiterate or semi-literate censorship groups. This subsection, however, certainly does not apply to the entertainment here described.

"(d) . . . .

"(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material." The sole purpose of the entertainment in the case at bar was for the promotion of the sale of liquor.

"(f) purpose and reputation of the author, publisher or disseminator." This subsection is inapplicable to the present case.

The appellant was not entitled to a jury trial. In *Kingsley Books v. Brown*, 354 U. S. 436, 1 L. ed. 2d 1469, 77 S. Ct. 1325, in an opinion written by Mr. Justice Frankfurter, the Supreme Court decided that the due process clause does not subject the states to the necessity of having trial by jury in misdemeanor prosecutions. In that case the Supreme Court affirmed the New York courts in issuing a preliminary injunction to restrain the distribution of certain booklets alleged to be obscene. The procedure for the issuance and revocation of a license to sell liquor is prescribed in Pennsylvania by the Liquor Code. It is a privilege which has been granted by the legislature in recent years. It is not a matter which, at the time of the adoption of our Constitution, required a jury trial for its disposition. Certainly the appellant, when it elected to avail itself of this procedure, did not obtain the right to have a trial by jury in the event that the Commonwealth suspended the privilege for a proper reason. Due process has been afforded by the provisions of the Liquor Code,

which provide for a hearing before an examiner and an appeal to the Liquor Board and then further appeal to the court of quarter sessions and the appellate court. It is clear that under the law of Pennsylvania the revocation of a license or permit does not give rise to such a right. *Premier C. & B. Co. v. Pa. Alcohol Permit Bd.*, 292 Pa. 127, 140 A. 858; *Watson Appeal*, 377 Pa. 495, cert. den. 348 U. S. 879, 105 A. 2d 576. We have expressly decided that there is no right to a trial by jury for any violation of the Liquor Code: *Penelope Club Liquor License Case*, 136 Pa. Superior Ct. 505, 7 A. 2d 558.

The Pa. Liquor Control Board is given the right "From time to time to make such regulations not inconsistent with this act as it may deem necessary for the efficient administration of this act." § 207, 47 PS § 2-207(h) (i).

The purpose of the Liquor Code, as stated in § 1-104(a), is as follows: "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth and to prohibit forever the open saloon, and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose." The appellant attacks the regulation of the board which prohibits entertainers from associating with patrons. It is self-evident that the mingling of nude or scantily-clothed female entertainers with male patrons of a bar does not promote the public morals and welfare. We are of the opinion that the regulation here involved is reasonable and proper and is designed to promote the efficient and proper administration of the Liquor Code.

Order affirmed.

OPINION OF THE COURT OF QUARTER SESSIONS FOR PHILADELPHIA COUNTY.

Again the courts have a case over words,—their significance, construction and application from conduct and under protected speech and due process. "Lewd, immoral or improper" are the words; it is unlawful under the Liquor Code ". . . for *any* licensee, under *any* circumstances, to permit in *any* licensed premises *any* lewd, immoral or improper entertainment." 47 P. S. Sec. 4-493(10). I under line unto emphasis [in order to emphasize] the Legislature's flint firmness on public welfare.

The three appellants are three liquor licensees, each of whose licenses was suspended by the Pennsylvania Liquor Control Board under this section because of lewd, immoral or improper entertainment. (Other grounds of suspension are not of importance here.) There were appeals to us; in two of these appeals the testimony before the Liquor Board became our testimony by agreement, in the third I heard testimony. On facts and law, I see no distinction in the three cases, and I bring them together as one.

A strong protest by these licensees is our Federal First Amendment in its application to the States under the encompassing ken of our Federal Fourteenth Amendment, and I take it in conjunction therewith the invaluable right of every citizen freely to speak, set down in Article 1, Sec. 7 of our State Constitution. To that protest, a quick answer comes as a ready bestowal in a recent decision (June 24, 1957) of the Supreme Court of the United States,—Roth v. United States, 354 U. S.—; 77 S. Ct. 1304. The unconditional First Amendment can be conditional; human universality is not without exception: "We hold that obscenity is not within the area of constitutionally protected speech or press,"—Roth case, supra, p. 1309. See Chaplinsky v. New Hampshire, 315 U. S. 568, 571-2; Hallmark Productions, Inc. v. Carroll, 384 Pa. 348, 357 (footnote). The

Liquor Code uses the word "lewd" but I see no reason in semantics or law to assign or create delicate or subtle gradations or a shift in emphasis of meaning in or between the word "lewd" and the word "obscene." The federal obscenity statute uses both words "obscene, lewd," also the words "libidinous, or filthy . . ." The California statute uses the words "obscene or indecent." See the Roth case, supra, p. 1312. The words are kindred in expression and convey the same meaning. See Rosen v. United States, 161 U. S. 29, 42. The licensees' argument runs that the words "lewd, immoral or improper" make a law too doubtful to bind, the words are too vague and indefinite to tell a licensee what he may not offer to his patrons in entertainment. I hold these words together to be the same concept and formulation as the words of the Federal statute or the California statute. Half the phrase is enough for the awareness of the reasonable man, though only the word "improper" might not be enough, for this word alone may turn upon taste rather than decency. The words together are precise enough; "a fair warning (is) given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed:" McBoyle v. United States, 283 U. S. 25, 27; they need not mean only the excess of folly portrayed in the 19th Chapter (22-30) of the Book of Judges. Preciseness is not the feature of many words or phrases in the law, —"negligence," "malice," "wilful." Words need not be arithmetical in precision; these words give standard enough for common understanding and the "Constitution does not require impossible standards."

United States v. Petrillo, 332 U. S. 1, 7-8; Roth case, supra, p. 1312-1313 and cases cited. The other day, our Superior Court gave its sanction to the word "morals" in a criminal statute as a word of "definite and well settled meaning." Commonwealth v. Randall, 183 Pa. Superior Court 603, 608.

And so I hold that the Liquor Control Code, in the pertinent section (47 P. S. Sec. 4-493 (10)) tells a licensee enough to know what not to offer in entertainment. See Roth case, supra, p. 1313.

It must be allowed, too, that the sanction here imposed by the Board was not penal, though penal sanctions can be imposed. See 47 P. S. 4-494. Cf. Winters v. New York, 333 U. S. 507. As to penal sanctions, the Roth case, supra, involved two matters of penal sanction, and our own Penal Code (18 P. S. 4524) proscribing "any obscene, lewd, lascivious, filthy, indecent, or disgusting book" was sustained on sufficiency of standards. Commonwealth v. New, 142 Pa. Superior Court 358. See Commonwealth v. Donaducy, 167 Pa. Superior Ct. 611; Commonwealth v. Gordon, 66 D. & C. 101, affirmed sub nomine; Commonwealth v. Feigenbaum, 166 Pa. Superior Ct. 120 (Reporter's note: p. 120 as to refusal of allocatur by the Supreme Court).

There is another proposition I may not lay aside,—the licensing of the sale of liquor is lawful only to the extent the Legislature says it is lawful (Federal Twenty-first Amendment; Commonwealth v. Speer, 157 Pa. Superior Court 197), and a liquor license is a privilege, and no more. See Cavanaugh v. Gelder, 364 Pa. 361 (cert. denied 340 U. S. 822). The judgment of the Legislature is decisive, and conceivably it could respond to a demand for prohibition. Then, it follows, when the Legislature permits sales of liquor, it can direct itself to regulate that permission and attach conditions, amongst which, in discernment, a restriction on the kind of entertainment a licensee may offer.[1]

The licensees point to the "movie" cases, that series of decisions in which the courts invalidated statutes providing standards of censorship. Joseph Burstyn, Inc. v. Wilson, et al., 343 U. S. 495; Superior Films, Inc. v. Department

1. I do not have to say now that any condition of the Liquor Control Board as an administrative agency would stand. Cf. Roth v. United States, supra, opinion by Harlan, J., p. 1319, footnote 5.

of Education, Division of Film Censorship, 346 U. S. 587; Hallmark Productions, Inc. v. Carroll, 384 Pa. 348. They are elaborated in the Hallmark case, supra, by then Chief Justice Stern. In the "movie cases" there is traditionally involved the standard used by Censor Boards before the films are shown. The Burstyn case, supra, is typical. In this case, the court, while holding that "sacrilegious" was so vague a standard as to be violative of the 14th Amendment, did not prevent a State from prohibiting, within valid standards, motion picture exhibitions that offend the community's sense of decency. The movie cases present problems of prior restraint. The recent cases make one matter certain; in putting statutory standards to the test of "vague and indefinite" the courts are more apt to invalidate those standards used by an agency in restraining films or writings prior to their exhibition, than they are in invalidating standards where the conduct is punished after publication.

Licensees' position is not strengthened by reliance on our Supreme Court's recent holding in Hallmark Productions, Inc. v. Carroll, 384 Pa. 348, supra. In this case, again, the standards were invoked by the State Board of Censors prior to the showing of the motion films.

The cases here are not of prior restraint, and I do not have to determine a situation where the Board stops a show before it goes on. The future restraint by way of suspension is for past conduct. "It need hardly be added that even if all pre-censorship of motion picture films were held to be invalid, this would not in and of itself affect the right to suppress objectionable films, if exhibited, or to punish their exhibitor." Hallmark case, p. 358, supra.

Finally, I hold and find as a fact that the entertainment in each instance here was lewd, immoral or improper. The entertainment in each of these cases was a predominant appeal to purient interest. Roth case, supra, p. 1310, and footnote 20 on that page.

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In The
Supreme Court of the United States

October Term, 1959
No. 363

TAHITI BAR, INC.,
Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD
and
COMMONWEALTH OF PENNSYLVANIA

October Term, 1959
No. 379

LEHIGH CASINO, INC.,
Appellant
v.
PENNSYLVANIA LIQUOR CONTROL BOARD
and
COMMONWEALTH OF PENNSYLVANIA

MOTIONS TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

	Page
Motions To Dismiss or To Affirm:	
Statement as to Jurisdiction	1
Opinions Below	3
Jurisdiction	4
Counterstatement of Questions Involved	8
Statement of the Case	9
Argument:	
I. This case does not involve infringements upon the right of freedom of expression	11
II. A liquor license is a privilege which may be granted upon reasonable conditions or withheld entirely	13
III. The phrase "lewd, improper or immoral" as construed by the Pennsylvania courts, meets the requirements of the Fourteenth Amendment and the proposed definitions of the American Law Institute	15
IV. The grounds for revocation of a liquor license do not offend the Fourteenth Amendment by unconstitutionally abridging freedom of speech	22
V. There is no constitutional requirement for trial by jury in the revocation of a liquor license	24
VI. Whether the State in its regulation of the privilege of dispensing alcoholic beverages may condition that privilege by prohibiting conduct which might in another setting be constitutionally protected is moot in view of the finding that the entertainment was in fact obscene	26

VII. The regulation of the Liquor Control Board prohibiting entertainers from associating with patrons in licensed premises is a valid, reasonable and constitutional exercise of police power 27

Conclusion 29

TABLE OF CITATIONS

Cases:

Alberts v. California, 354 U. S. 476 (1957) 17

Boyle's License, 8 Pa. Superior Ct. 521 (1898), aff. 190 Pa. 577 (1899) 13

Burnstyn v. Wilson, 343 U.S. 495 11

Butler v. Michigan, 352 U. S. 380 (1957) 23

Cavanaugh v. Gelder, 364 Pa. 361 (1950), cert. den. 340 U. S. 822 13, 14

Commonwealth v. Feigenbaum, 166 Pa. Superior Ct. 120 (1950) 17

Commonwealth v. Gordon, 66 D. & C. 101 (1949) 17

Commonwealth v. Penelope Club, 136 Pa. Superior Ct. 505 (1939) 25

Commonwealth v. Speer, 157 Pa. Superior Ct. 197 (1945) 13

Commonwealth v. Stofchek, 322 Pa. 513 (1936) 13

Crane v. Campbell, 245 U. S. 304 (1917) 13, 26

Goesaert v. Cleary, 335 U. S. 464 (1948) 13

Hallmark Productions, Inc. v. Carroll, 384 Pa. 348 (1956) 12

Kingsley v. Brown, 354 U. S. 436 (1957) 22, 24

Kingsley International Pictures Corporation v. Regents of New York, 360 U. S. 684 (1959) 16, 23

Premier C. & B. Co. v. Pennsylvania Alcohol P. B., 292 Pa. 127 (1928) 25

Regina v. Hicklin, 3 Q. B. 360 (1868) 11

Roth v. United States, 354 U. S. 476 (1957) 16, 17, 22
Sawdey Liquor License Case, 169 Pa. Superior Ct. 214 (1951) 14
Spankard's License, 138 Pa. Superior Ct. 251 (1939) 13
State Board of Equalization of California, 299 U. S. 59 (1936) 13
Tahiti Bar, Inc. Liquor License Case, Lehigh Casino Liquor License Case, 395 Pa. 355, 367, 368 15
Watson Appeal, 377 Pa. 495 (1954), cert. den. 348 U. S. 879 25
Ziffren v. Reeves, 308 U. S. 132 (1939) 13

STATUTES:
18 U.S.C. Section 1461 6, 17
24 U.S.C. Section 1257(2) 4
Pennsylvania Liquor Code, Act of April 12, 1951, P.L. 90, 47 P.S. Sec. 1-101 et seq.:
Article IV, 47 P.S. Sec. 4-493 4, 8, 15
Article IV, 47 P.S. Sec. 4-494 5
Article IV, 47 P.S. Sec. 463(a) 13
Article IV, 47 P.S. Sec. 1-104(a) 27
Article IV, 47 P.S. Sec. 2-207 (h)(i) 27
West's California Penal Code Ann. 1955, Sec. 311 6

MISCELLANEOUS:
American Law Institute, § 207.10(2) 18
Control of Entertainment, 71 Harv. L. Rev. 326 (1950) 23
Regulation 110.02D 7
United States Constitution, First Amendment 20
United States Constitution, Seventh Amendment 25
United States Constitution, Fourteenth Amendment 8, 20, 25
Williams, Obscenity in Modern English Law, 20 Law & Contemp. 630 (1955) 11

MOTIONS TO DISMISS OR TO AFFIRM

STATEMENT AS TO JURISDICTION

The Attorney General of Pennsylvania on behalf of the Commonwealth of Pennsylvania and the Pennsylvania Liquor Control Board, Appellees, files this Motion to Affirm and this Motion to Dismiss in both of the above entitled matters pursuant to Rule 16 of the Rules of the United States Supreme Court asserting:

1. That the question on which the decision of both of these cases depends, namely the constitutionality of the Pennsylvania Liquor Code authorizing the revocation of a liquor license for the exhibition of "any lewd, immoral or improper" entertainment in the licensed premises when that phrase has been construed to be the equivalent of "obscene" is so insubstantial as not to need further argument.

2. That the revocation of a liquor license after two findings of fact by competent tribunals that the performance taken as a whole and judged by the average man was "obscene" does not present a substantial federal question.

3. That the affirmation of the revocation of a liquor license in accordance with the provisions of the statute and after the licensee has been accorded two hearings in which he admittedly received due process of law rests on an adequate non-federal basis.

JURISDICTION

These appeals are from orders of the Supreme Court of Pennsylvania upholding the constitutionality of certain portions of the Pennsylvania Liquor Code and Regulation 110.02D issued pursuant thereto, and affirming the orders of the Superior Court of Pennsylvania (and, in effect, of the Court of Quarter Sessions for Philadelphia County) which affirmed the order of the Pennsylvania Liquor Control Board suspending the appellants' restaurant liquor license and amusement permit. The Supreme Court of Pennsylvania issued its orders on March 25, 1959. Notice of appeal to this Court was filed with the Supreme Court of Pennsylvania on May 1, 1959. An extension of time for docketing the appeal in this Court until August 29, 1959, was granted by the Supreme Court of Pennsylvania on June 1, 1959.

Appellants invoked the provisions of 24 U.S.C. Section 1257 (2) conferring jurisdiction upon this Court to review an appeal from a final judgment of the Supreme Court of Pennsylvania.

Appellants assert that there is involved herein the constitutionality of the Pennsylvania Liquor Code, Act of April 12, 1951, P.L. 90, 47 P.S. Sec. 1-101 et seq. Article IV thereof (47 P.S. Sec. 4-493) provides in pertinent part that it shall be unlawful:

> "(10) For any licensee, his servants, agents or employes, except club licensees, to permit in

any licensed premises or in any place operated in connection therewith, dancing, theatricals or floor shows of any sort, or moving pictures other than television, or such as are exhibited through machines operated by patrons by the deposit of coins, which project pictures on a screen not exceeding in size twenty-four by thirty inches and which forms part of the machine, unless the licensee shall first have obtained from the board a special permit to provide such entertainment, or for any licensee, under any circumstances, to permit in any licensed premises any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not. The board shall have power to provide for the issue of such special permits, and to collect a fee for such permits equal to one-fifth of the annual license fee but not less than twenty-five dollars ($25). All such fees shall be paid into the State Stores Fund. No such permit shall be issued in any municipality which, by ordinance, prohibits amusements in licensed places. Any violation of this clause shall, in addition to the penalty herein provided, subject the licensee to suspension or revocation of his permit and his license.

Section 494 of the Pennsylvania Liquor Code (47 P.S. Section 4-494) provides for penalties for violation of Article IV:

"(a) Any person who shall violate any of the provisions of this article, except as otherwise specifically provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars

($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month, nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year.

"(b) The right of the board to suspend and revoke licenses granted under this article shall be in addition to the penalty set forth in this section."

The Superior Court in its opinion ruled specifically on the constitutionality of the words "lewd, immoral or improper" holding that "the words used in the Pennsylvania Liquor Code provides substantially the same concept as do the words of the Federal statute [18 U.S.C. Sec. 1461] or the California statute [West's Cal. Penal Code Ann., 1955, Sec. 311] and the words taken together, are sufficiently precise. We are of the opinion that the words used in the lower court when taken together are sufficiently clear to enable any ordinary person to understand what kind of entertainment is proscribed. The court below in its opinion expressly found that the entertainment was a predominant appeal to prurient interest. In its opinion, the court below made express reference to the Roth and Alberts cases hereinbefore referred to, and we are convinced that the proper standard for evaluating the entertainment was used." The Supreme Court of Pennsylvania affirmed the decision of the Superior Court.

Jurisdiction

Also involved herein is Section 110.021 of the Regulations promulgated by the Pennsylvania Liquor Control Board, which provides in pertinent part:

> "No licensee shall require, request or permit any person engaged directly or indirectly as an entertainer in the licensed establishment or in any room or place connected therewith, to contact or associate with the patrons in such establishment, room or place for any purpose whatsoever * * *."

The Superior and Supreme Courts of Pennsylvania sustained the constitutionality of this section of the Regulations.

4. That a regulation of the Pennsylvania Liquor Control Board prohibited the mingling of entertainers and patrons in licensed premises where liquor is sold and consumed is a matter exclusively within the police power of this state and does not present a federal question.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania in both cases filed March 25, 1959, is reported at 395 Pa. 355, 150 A. 2d 112. The opinion of the Superior Court of Pennsylvania in Tahiti Bar filed June 11, 1958, is found at 186 Pa. Superior Ct. 214, 142 A. 2d 491, and the opinion of the Court of Quarter Sessions for the County of Philadelphia, filed May 20, 1957 is not reported. The opinion in Lehigh Casino, filed June 11, 1958, is found at 186 Pa. Superior Ct. 223, 142 A. 2d 495 and the opinions of the Court of Quarter Sessions for the County of Philadelphia filed July 26, 1957 and November 14, 1957 are not reported.

COUNTERSTATEMENT OF QUESTIONS INVOLVED

The questions presented by these appeals are:

1. Whether Section 493 of Article 4 of the Pennsylvania Liquor Code authorizes the revocation of a liquor license *after* the exhibition of "lewd, immoral or improper" entertainment on the licensed premises when that phrase has been construed by the Pennsylvania courts to be synonymous with "obscene" and defined as entertainment in which there "was a predominant appeal to prurient interest", does not conform to the requirements of the Fourteenth Amendment.

2. Whether since the entertainment in question was found as a fact to be "obscene" as constitutionally defined, any question as to the right of the state to prohibit entertainment when such prohibition would otherwise be violative of the Fourteenth Amendment is moot.

3. Whether the findings of the fact of obscenity by two competent tribunals raises any constitutional question.

4. Whether Regulation 110.02D prohibiting entertainers from mingling with patrons of licensed premises where liquor is sold or consumed is outside the ambit of the Fourteenth Amendment and within the police power of the Commonwealth.

STATEMENT OF THE CASE

Both of the appellants operate in the City of Philadelphia, establishments licensed under the Pennsylvania Liquor Code. On November 1, 1956, the Pennsylvania Liquor Control Board found that appellant, Tahiti Bar, had permitted "lewd, immoral and or improper" entertainment on the licensed premises on April 3 and 4, 1956, and that appellant permitted "entertainers to contact and or associate with patrons" on the licensed premises on April 3 and 4, 1956. On December 19, 1956, the Pennsylvania Liquor Control Board found that appellant, Lehigh Casino, had permitted "lewd, immoral and or improper" entertainment on the licensed premises on May 24, and May 26, 1956, and that appellant permitted "entertainers to contact and or associate with the patrons" on the licensed premises. The Board, therefore, suspended the restaurant liquor license and amusement permit of Tahiti Bar for 40 days and the license and amusement permit of Lehigh Casino for 60 days.

The evidence before the Board was stipulated as evidence also before the Court of Quarter Sessions for Philadelphia County in the appeals to that court from the Board's orders of suspension. The testimony of the enforcement officers of the Board in each case was to the effect they visited the premises on the specified dates. The officers observed "exotic" dances. At no time has appellant contended that the entertainments were not, in fact, obscene or that there was insufficient evidence to sustain the findings of fact by the Board

and the independent findings by the Court of Quarter Sessions. The stipulated evidence was in part as follows:

> "At the time we entered, the show was in progress and a girl named Laura Mason was on the stage; she was a black haired girl. She was attired in a black jacket and black skirt, which was open in the front. She was wearing black net hose. After strutting about the stage, she removed the jacket and was wearing a black bra trimmed with rhinestones. She removed the skirt and was wearing a black G string with silver ornaments over the private area. She then removed the black bra and was wearing a flesh net bra over silver pasties. Still later, she removed the net bra and was wearing silver pasties only. * * * she also later removed the silver ornament which dangled over her private area and was then wearing nothing but the silver pasties and the black G string. She performed bumps and grinds and also touched and held her breasts with her hands and also ran her hands over and on her private area. While remaining stationary, she would move her lower extremities, including her vaginal area, in a backward and forward movement. * * *" (Record before the Superior Court of Pennsylvania. In the matter of Commonwealth of Pennsylvania v. Lehigh Casino, Inc. pp. 5a and 5b.)

ARGUMENT

I. This Case Does Not Involve Infringements Upon the Right of Freedom of Expression

At the outset, it must be recognized that this case involves the revocation of a liquor license; it is not concerned with censorship of speech, press or motion pictures.[1] It does not involve a prior restraint upon any type of expression whatsoever; it does not involve a criminal penalty. Counsel for the appellant attempts to make this case involving the revocation of a liquor license for lewd and obscene entertainment and fraternizing of the entertainers with the patrons a constitutional case involving freedom of speech and expression. Each license was suspended only after a finding by the Board that the entertainment was in fact obscene. No question of due process in the nature of the hearing or the procedure followed is at issue. Nor has there been any seizure of property or damage to the appellant's business. The only action of the Board was to suspend the license of the appellant.

[1] The Commonwealth is not attempting to revert to the Comstock law to reinstate the rule of *Regina v. Hicklin*, 3 Q.B. 360 (1868), or to urge a return to the status of the law of censorship prior to *Burstyn v. Wilson*, 343 U.S. 495. The Commonwealth maintains that it is within its police power to suspend or revoke a liquor license when the licensee is in violation of the state statute prohibiting lewd performances in a licensed establishment. Cf. the English law of obscenity: Williams, *Obscenity in Modern English Law*, 20 Law & Contemp. 630 (1955).

Tahiti Bar, for a period of forty (40) days and the license of appellant, Lehigh Casino, for a period of sixty (60) days. A supersedeas was granted in each case, pending a final determination of the litigation.

Considerable reference has been made to *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348 (1956). It should be noted that in the cited case the Commonwealth argued before the Pennsylvania Supreme Court that the Pennsylvania Motion Picture Censorship Act was unconstitutional in the light of the recent United States Supreme Court decisions. The Supreme Court of Pennsylvania invalidated the motion picture censorship act, but also pointed out that "even if all precensorship of motion picture films were to be held invalid this would not in and of itself affect the right to suppress objectional films it exhibited, or to punish their exhibitor". *Hallmark Productions Inc. v. Carroll*, supra, at page 358. In the case at bar, the licenses have been suspended after obscene entertainment was permitted on the premises. There is nothing in the recent cases involving censorship and freedom of expression which in any way casts doubt upon the validity of these sections of the Pennsylvania Liquor Code.

II. A Liquor License Is a Privilege Which May Be Granted Upon Reasonable Conditions or Withheld Entirely

The state has plenary power to regulate, control or prohibit the use and sale of alcoholic beverages: *Goesaert v. Cleary*, 335 U.S. 464 (1948); *State Board of Equalization of California*, 299 U.S. 59 (1936); *Ziffrin v. Reeves*, 308 U.S. 132 (1939); *Crane v. Campbell*, 245 U.S. 304 (1917).

The authority of the Commonwealth to prohibit entirely or to regulate the sale and possession of liquor is an "exercise of police power for the protection of the public welfare—and the morals of the people." *Commonwealth v. Stofchek*, 322 Pa. 513 (1936). A liquor license is a privilege and not a property right. *Cavanaugh v. Gelder*, 364 Pa. 361 (1950), cert. den. 340 U.S. 822; *Spankard's License*, 138 Pa. Superior Ct. 251 (1939). In the granting and revocation of liquor licenses under the police power, the Commonwealth may establish the regulations and terms upon which the license may be granted and retained. *Commonwealth v. Speer*, 157 Pa. Superior Ct. 197 (1945); *Bogle's License*, 8 Pa. Superior Ct. 521 (1898), aff. 190 Pa. 577 (1899).

The respondent is engaged in the restaurant business. As a matter of fact, were this establishment one where entertainment was the business rather than a mere incident of another endeavor, no license could be lawfully issued. The Liquor Code, the Act of April 12, 1951, P.L. 90, Article IV, §463(a) provides:

> "No license for the sale of liquor or malt or brewed beverages in any quantity shall be granted to the proprietors, lessees, keepers, or managers of any theater, circus, museum or other place of amusement. . . ."

It is a business which, through its desire to serve alcoholic beverages, has submitted to the jurisdiction of the Pennsylvania Liquor Control Board and the provisions of the Liquor Code, and to which entertainment is but an inducement offered to secure patronage. In so submitting, the license acquires only a privilege to operate in a mode and manner to be prescribed by the State. In fact, the courts have held that the liquor business is unlawful and its conduct is only lawful to the extent and in the manner permitted by statute. *Sawdey Liquor License Case*, 169 Pa. Superior Ct. 214 (1951). The legislature might therefore forbid any entertainment or amusement upon the licensed establishment. The Supreme Court of Pennsylvania, in *Cavanaugh v. Gelder*, supra, ruled:

> "The legislature had the power to absolutely forbid, or to grant under specified conditions, licenses for the sale of intoxicating liquors. It had the power to absolutely forbid or to permit under specified conditions, entertainments in licensed establishments."

The Liquor Control Board is authorized to suspend or revoke the license of any licensee violating any provision of the Liquor Code. From the foregoing discussion it is clear that a liquor license is subject to regulation and control under the police power of the State.

III. The Phrase "Lewd, Improper or Immoral" as Construed by the Pennsylvania Courts, Meets the Requirements of the Fourteenth Amendment and the Proposed Definitions of the American Law Institute

The Pennsylvania Liquor Control Board found, on the undisputed testimony of the eyewitnesses, that the entertainments in question were in violation of the statute.

Three Pennsylvania courts have held that under any definition of obscenity the entertainments were in fact obscene. The Supreme Court of Pennsylvania stated: "Nor do we have any hesitation in affirming the decision of the courts below that the entertainment in question violated Section 493 in that it was 'lewd, immoral and or improper'. Both the trial court and the Superior Court, equating the terms 'lewd and improper' with 'obscene', found that the entertainment was a predominant appeal to prurient interests. Thus both tribunals, applying the test associated with attempts on the part of a state to restrict freedom of speech and expression, * * * found that appellants had violated Section 493 and that their licenses had been properly suspended. Our view of the record demonstrates the propriety and correctness of this determination. No purpose would be served by a repetition of the factual description of the entertainment contained in the record to demonstrate, as stated by the Superior Court, that it 'was lewd or obscene as well as immoral under any definition of these terms.'" *Tabiti Bar, Inc. Liquor License Case, Lehigh Casino Liquor License Case*, 395 Pa. 355, at pp. 367, 368.

The phrase "lewd, immoral or improper" as construed by the Pennsylvania courts is not vague or indefinite. The statute must be read in the light of the construction placed upon this provision by the Pennsylvania Courts. *Speiser v. Randall*, 357 U.S. 513, 519 (1958).

Note that in *Kingsley International Pictures Corporation v. Regents of New York*, 360 U.S. 684 (1959), a determining factor was the explicit rejection by the Court of Appeals of a finding that the film was obscene. There can be little doubt that the State, under its police power, may punish as criminal conduct the exhibition of obscene performances. The issue as to whether the entertainments here in question were or were not obscene has not been raised by the appllants. Apparently, appellants concede that these entertainments were obscene since they place their reliance upon the argument of the inadequacy of the definition of "obscenity" in the light of the protection of the Fourteenth Amendment. It is a truism that although obscenity may be difficult to define, it is easy to recognize. This court can make its own determination from the record as to whether or not the appellate courts of Pennsylvania erred in affirming the findings that the entertainments were, in fact obscene. In *Roth v. United States*, 354 U.S. 476 (1957), the finding of obscenity by the trier of fact was not reviewed by the appellate court. It was upon this ground that Mr. Justice Harlan based his dissent. The Commonwealth submits that the Court of Quarter Sessions, the Superior Court and the Pennsylvania Supreme Court were correct in holding that a finding of obscenity under any definition is amply supported by these records.

The definition of obscenity, as construed by the Pennsylvania Courts, has been commended by legal scholars. Moreover there has been no complaint that the Board has abused its statutory authority to "censor" artistic performances or controversial expression of any sort. The appellants are, in effect, urging that this Court reverse itself and adopt the clear and present danger test as applied to obscenity which it expressly rejected in the *Roth* case, supra.

The Liquor Code provides that a license may be revoked if the entertainment on the licensed premises is "lewd, immoral or improper". Both the Commonwealth and the courts below treated these three words as interchangeable synonyms for "obscene". The Pennsylvania Penal Code, 18 P.S. §4524, makes criminal the sale or distribution "of any obscene, lewd, lascivious, filthy, indecent or disgusting book". The sufficiency of standards in this definition was sustained by the Superior Court in *Commonwealth v. Feigenbaum*, 166 Pa. Superior Ct. 120 (1950), affirming *Commonwealth v. Gordon*, 66 D. & C. 101 (1949).

The statute involved in the *Roth* case, supra, was the federal obscenity statute, which is very similar to that of Pennsylvania. It declares to be nonmailable "every obscene, lewd, lascivious or filthy book, pamphlet, picture, paper, letter, writing, printing, or other publication of an indecent character. * * *" 18 U.S.C. 1461. In the companion case, *Alberts v. California*, 354 U.S. 476 (1957), the California Penal Code made anyone who writes, publishes, etc., any "obscene or indecent writing, paper or book" guilty of a misdemeanor. This Court found little difficulty with the use of the language in either statute. In both cases,

the lower courts had followed tests similar to that adopted by the Pennsylvania Courts in the *Feigenbaum* case and by the Pennsylvania Superior Court in the cases at bar and had considered whether the publication taken as a whole, as applied to the average person, constituted "dirt for dirt's sake".

In the cases at bar, the Court of Quarter Sessions held that the words in the Liquor Code provide the same concept and standard as the words of the federal statute or the California statute and that the words taken together in this context are sufficiently precise. With respect to the word "improper", the court stated: "Half the phrase is enough for the awareness of the reasonable man; only the word 'improper' might not be enough, for this word alone may turn upon taste rather than decency." Therefore, the court construed the phrase "lewd, immoral or improper" as synonymous with "obscene". The court found as a fact that the entertainment in each instance was "lewd, immoral or improper". In view of this careful opinion, it cannot be argued that the use of the disjunctive in the court's order, merely following the wording of the statute, is a holding that the entertainment was not lewd, immoral and improper and, in other words, obscene. There is, therefore, no constitutional lack of definiteness of standards in the Liquor Code.

Appellant attempts to substitute for the Pennsylvania definition of obscenity, i.e., "dirt for dirt's sake", in considering the publication or presentation as a whole and its effect upon the average adult, that the American Law Institute: §207.10(2). "Obscenity" is there defined as follows:

> "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest,

i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even if the obscenity is latent, as in the case of undeveloped photographs. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

The subtle distinctions between the two definitions are irrelevant to the cases at bar. Testing the entertainments in question by the ALI standards, we find that it falls well within all of its criteria.

The conduct of the entertainers as testified to, was "considered as a whole" by the court below. "Its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex * * * and it goes substantially beyond customary limits of candor in description or representation of such matters." It can hardly be argued that customary candor includes "bumps and grinds" by a practically unclothed female entertainer in a bar.

The ALI further provides that it shall be admissible to show the following five factors:

> "(a) the character of the audience for which the material was designed or to which it was directed."

The Superior Court observed that in the case at bar, the audience consisted of male patrons of an ordinary bar. Under this standard, a select audience

of college professors or aesthetes engaged in watching esoteric dances might view nude dancers engaging in erotic motions and gestures and such a performance might not under the circumstances be considered obscene. There is no suggestion in the record that the purpose of this entertainment was other than to appeal to the prurient interest of the patrons of the bar or that the character of the patrons of this bar was in any way special or entitled to unusual consideration. Such a conclusion based upon the undisputed record showing the nature of the bar and the numbers and sex of the patrons was clearly justified. Indeed, appellant does not argue to the contrary.

> "(b) what the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on behavior of such people."

Appellant has not attempted to show what appeal for or what effect on the ordinary adult or any other person this entertainment would have. We believe that the Superior Court and the Supreme Court of Pennsylvania on this stipulated record properly took judicial notice of the appeal of this entertainment to the ordinary adult patron of a bar and the effect it would have upon his behavior.

> "(c) Artistic, literary, scientific, educational or other merits of the material."

Appellant has not alleged that this entertainment has any artistic, literary, scientific, educational or other merit. We do not argue that a communication must be meritorious or of artistic excellence to receive the protections of the First and Fourteenth Amendments. However, with respect to obscenity, the ALI has in-

cluded criterion (c) in an obvious effort to protect works of scientific or artistic merit which might otherwise be construed as "obscene" by illiterate or semi-illiterate censorship groups. The record discloses no artistic merit of any kind in this entertainment and none is alleged by appellant.

> "(d) the degree of public acceptance of the material in this country."

Whether or not this factor of public acceptance is or should be the law of Pennsylvania and a determining criterion in judging the constitutionality of State statutes under the Fourteenth Amendment is a question which need not be decided in this case. Appellant has not argued that the Philadelphia public accepts this type of entertainment in public places and that, therefore, it should not be considered obscene. Such a major premise, we submit, would be wholly without factual foundation.

> "(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material."

The appeal of this entertainment can be only to prurient interest and for the promotion of the sale of liquor. The Superior Court and the Supreme Court so found.

> "(f) purpose and reputation of the author, publisher or disseminator."

This subsection is, of course, wholly inapplicable to the instant case.

We conclude, therefore, that under the standards urged by appellant, the entertainment in question was properly held to be obscene.

IV. The Grounds for Revocation of a Liquor License Do Not Offend the Fourteenth Amendment by Unconstitutionally Abridging Freedom of Speech

In the *Roth* case, supra, Mr. Justice Brennan, speaking for the majority, stated at page 481, "The dispositive question is whether obscenity is utterance within the area of protected speech and press." The Court held that obscenity was outside that protection. The entire thrust of appellant's argument is that the United States Supreme Court was wrong and that it should reverse itself.

Appellant further argues that the revocation of a liquor license for obscene entertainment which merely arouses lustful desires or thoughts on the part of the viewers is penalizing the viewer for thoughts rather than conduct. The liquor license is revoked not for the thoughts which are aroused in the beholders of the entertainment, but for the knowing and willful conduct of the licensee in providing such entertainment in violation of the statute. It must be borne in mind that appellants are holders of a liquor license and, additionally, permits to present entertainment at a bar or taproom. The permit to present entertainment could be withheld altogether. Likewise, the liquor license itself is not a matter of right (see point II infra).

Appellants lean heavily upon the dissenting opinions in the obscene literature cases. In *Kingsley v. Brown*, 354 U.S. 436 (1957), the majority sustained the New York statute permitting a preliminary injunction against the sale or distribution of pornographic litera-

ture. Chief Justice Warren dissented, stating, "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature". In the case at bar, it is not the entertainer who is punished but the licensee whose license is revoked. The entertainment is not judged in vacuo but in the context of entertainment in a premise which has a liquor license. Moreover, the statutory remedy is not injunction to restrain conduct but the suspension or revocation of the license after the offending entertainment has been presented and has been found by the Liquor Control Board, after a hearing, to be "obscene". In view of these facts, the action of the courts below meets the requirements of both the majority and the dissenting opinions in the leading Supreme Court cases.

It should be noted that these standards apply to books. Greater latitude to prohibit pornography has been allowed the states in respect to pictures and motion pictures. Compare *Butler v. Michigan*, 352 U.S. 380 (1957), indicating that a separate standard of impropriety for children would not be unconstitutional. In like manner, other conditions prevail with respect to live performances in premises where liquor is sold and consumed. This Court in *Kingsley Pictures Corporation*, supra, at page 383, pointed out that it would not at that time determine whether the controls which a state may impose upon motion pictures "are precisely coextensive with those allowable for newspapers, books or individual speech". The standard applied by the lower courts in the cases at bar was the highest constitutional protection afforded to the printed word and individual speech. See, Note, *Control of Entertainment*, 71 Harv. L. Rev. 326 (1950).

V. There Is No Constitutional Requirement for Trial by Jury in the Revocation of a Liquor License

Again, the appellant has seized upon words in one of the dissenting opinions in *Kingsley v. Brown*, supra. Mr. Justice Brennan there questioned the right of the defendant to a jury trial.[1] It should be noted that in the cited case the New York statute provided for the seizure of obscene literature. Even the appellants in that case did not raise the issue of necessity for a jury trial to provide due process of law in a misdemeanor prosecution. In the case at bar, the revocation of a license is purely a statutory matter. There is no authority whatsoever for the contention that the appellants have been denied due process of law in the nature of the hearings which they have had to date. Each appellant has had a full and complete hearing before an examiner; each has had a complete consideration by the Pennsylvania Liquor Control Board. The cases were heard de novo on stipulated evidence before the Court of Quarter Sessions. All of those arguments were exhaustively considered by both the Superior Court and the Supreme Court of Pennsylvania. Appellants are not being deprived of liberty or property without due process of law. No property

[1] No penalties, as provided in the statute, were invoked against appellant. The right to a jury trial for the imposition of penalties (Question IV in each of appellants' Statements of Questions Presented) is not before this court. We deem the law to be well settled that there is no right to a trial by jury in such a case under Pennsylvania law. No federal constitutional question is involved.

has been taken. There is no suggestion that the action taken has been arbitrary or even mistaken. Innumerable state and federal agencies grant and revoke licenses and permits. Many of those involve substantial businesses and large sums of money. It has never been suggested that any licensee is entitled to more than a fair hearing before the administrative body and a right of appeal to a court. The constitutional right to a jury trial in Pennsylvania exists only with respect to actions in which under the common law there was a right to trial by jury. It is clear that under the law of Pennsylvania, the revocation of a license or a permit does not give rise to a right of trial by jury. *Premier C. & B. Co. v. Pennsylvania Alcohol P. B.*, 292 Pa. 127 (1928); *Waston Appeal*, 377 Pa. 495 (1954), cert. den. 348 U. S. 879; and *Commonwealth v. Penelope Club*, 136 Pa. Superior Ct. 505 (1939). Appellants have not cited any law to the contrary. Diligent research has failed to disclose any opinion which even inferentially casts doubt upon this question.

The fact that this revocation involves entertainment by unclothed dancers rather than a violation of service regulations by a public utility or purity of standards by a milk dealer does not bring into play either the right of free speech or the right of a trial by jury. No question arises under the Fourteenth or Seventh Amendments.

VI. Whether the State in its Regulation of the Privilege of Dispensing Alcoholic Beverages May Condition That Privilege by Prohibiting Conduct Which Might in Another Setting Be Constitutionally Protected Is Moot in View of the Finding That the Entertainment Was in Fact Obscene

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The Pennsylvania Supreme Court expressly affirmed the findings of the two lower courts that the entertainment was, in fact, obscene under the most restrictive constitutional definition. Thus, the additional reasoning of the Pennsylvania Supreme Court that with respect to the privilege of dispensing liquor, the control of the state exceeds that which it has in other settings is mere surplusage. It may well be argued that in its absolute control over the licensing of establishments to dispense liquor, the state is authorized to impose any reasonable conditions upon the granting of a license. *Crane v. Campbell*, 245 U. S. 204 (1917). Since the suspension of the license was under circumstances in which there was strict conformity with the requirements with the Fourteenth Amendment, the extent of the state's power is not at issue in the cases at bar.

VII. The Regulation of the Liquor Control Board Prohibiting Entertainers from Associating With Patrons in Licensed Premises Is a Valid, Reasonable and Constitutional Exercise of Police Power

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The Pennsylvania Liquor Control Board is given broad, general powers and duties with respect to the enforcement of the act. Under §207, 47 P.S. §2-207 (h) (i), the Board is authorized:

> "Without in any way limiting or being limited by the foregoing, to do all such things and perform all such acts as are deemed necessary or advisable for the purpose of carrying into effect the provisions of this act and the regulations made thereunder."

and

> "from time to time to make such regulations not inconsistent with this act as it may deem necessary for the efficient administration of this act."

Under Article 4 of the Liquor Code, it is unlawful for a licensee to provide any entertainment whatsoever unless he has obtained a special permit from the Board. The purpose of the Liquor Code, as stated in 1-104(a) is as follows:

> "This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth, and

to prohibit forever the open saloon; and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose."

In the light of these various sections, the Board has promulgated the regulation here under attack, namely, the prohibition against entertainers associating with patrons. The Superior Court held that: "It is self-evident that the mingling of practically nude or scantily-clothed female entertainers with male patrons of a bar does not promote the public morals and welfare." This decision was affirmed by the Supreme Court. The record discloses that there were twenty five male patrons and no female patrons at the Tahiti Bar on April 4, 1956. On April 3, 1956, there were twenty male patrons present (Record in the Pennsylvania Supreme Court p. 16a). In determining whether licenses which will promote the public morals and welfare shall be given and whether such licenses should include permits for entertainment, the Board is authorized to make such regulations as it deems necessary for the efficient administration of the act. Such regulations could reasonably include the prohibition of conduct on the part of entertainers which might be contrary to the public welfare and morals. We submit that the finding of the Superior Court, affirmed by the Supreme Court was amply supported by the evidence.

No federal question arises under this regulation.

CONCLUSION

The court below, on the basis of uncontroverted evidence, found that the entertainments in question were in violation of the State statute and applied a definition of "obscenity" which meets the requirements of both Pennsylvania law and the United States Constitution. The regulation in question was properly adopted under the authorization of the act and was within the police power of the state. Therefore, the Commonwealth urges that the appeals be dismissed or that the decisions be affirmed.

Respectfully submitted,

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